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Supreme Court of the United States

October Term, 1945.

No. 1238

GEORGE F. FISH, INC. and MICHAEL SIMON,
Petitioners,

AGAINST

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

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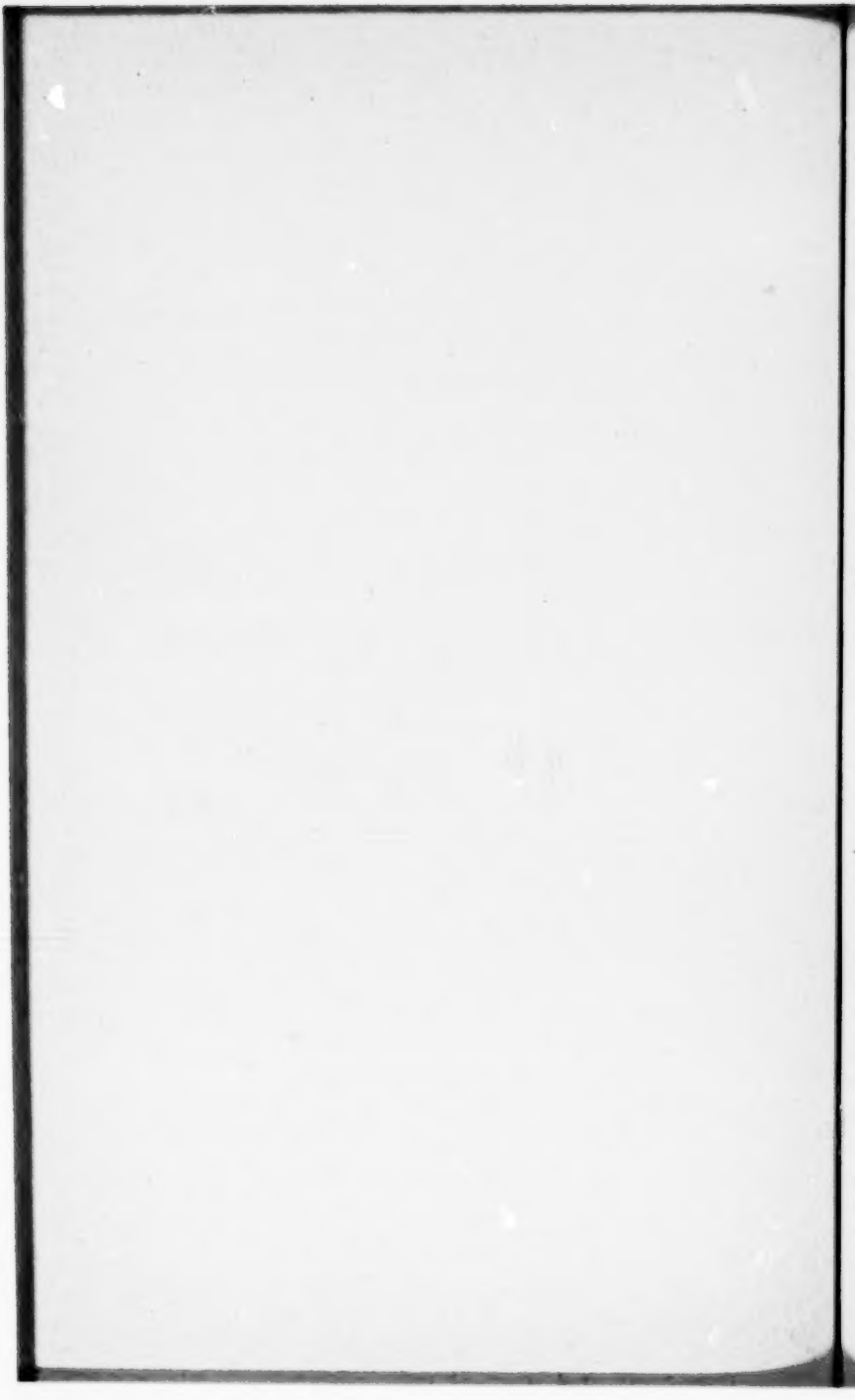

INDEX.

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statute and Regulations Involved	4
Statement	5
Specification of Errors to Be Urged	7
Reasons for Granting the Writ	7
Conclusion	11

CITATIONS.

PAGE

CASES:

M. Kraus & Bros. Inc. v. United States, ... U. S. ...., (decided March 25, 1946) . . 4, 7, 8, 9, 10, 11
Williams, et al. v. North Carolina, 325 U. S. 226 . . 10

STATUTES AND REGULATIONS:

Emergency Price Control Act of 1942, 50 Stat. 37 (U. S. C. Title 50, Appendix, Section 901 et seq.) 1, 2, 4
Maximum Price Regulation 426 (Fresh Fruits & Vegetables) 4, 5, 8
Evasion Section of Maximum Price Regulation 426 (Sec. 1439.3) 4, 7, 8
Evasion Section of Revised Maximum Price Regulation 269 (Poultry) (Sec. 1429.5) 7
Revised Maximum Price Regulation 287 (Clothing) (Sec. 15) 8 Fed. Reg. 9126 8
Revised Maximum Price Regulation 169 (Meat) Sec. 1464.406, 8 Fed. Reg. 4099 8
Maximum Price Regulation 330 (Women's and Children's Outer Garments) Sec. 1389.555, 8 Fed. Reg. 11041 8

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UNITED STATES OF AMERICA, *Respondent.*	

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, George F. Fish, Inc., a New York corporation, and Michael Simon, respectfully apply for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a judgment of that Court entered February 8, 1946 (R. 221), affirming two judgments of the United States District Court for the Southern District of New York (R. 5, 6) entered after a jury verdict (R. 157) in a criminal prosecution for alleged violations of maximum price regulations issued under the authority of the Emergency Price Control Act of 1942, and from an order of the United States Circuit Court of Appeals for the Second Circuit, on a rehearing, entered April 26, 1946, reaffirming its original decision (R. 240). A certified copy of the record in the case, including the

proceedings in said Circuit Court of Appeals is furnished herewith in accordance with Rule 38, paragraph 1 of the Rules of this Court.

Opinions Below.

The District Court rendered no opinion. The opinions of the Circuit Court of Appeals are not yet reported. The opinion on the original appeal is found at R. 214 and the opinion upon the rehearing is found at R. 237.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938, 28 U. S. C., Sec. 347 [a]) and as modified, pursuant to the Act of March 8, 1934 (18 U. S. C. Sec. 688), by Rule XI of the Rules of Practice and Procedure after verdict in criminal cases (292 U. S. 661, 666).

Questions Presented.

(1) Is the mere selling of lettuce, at the maximum price established by the Price Administrator under the Emergency Price Control Act of 1942, *in conjunction with* the sale of celery, broccoli or honeydew melons, upon which no ceiling price has been fixed, a criminal offense under the regulation of the Price Administrator which prohibits the evasion of established maximum prices by means of "tying-agreements", without defining such term, irrespective of whether the celery, broccoli or honeydew melons are sold at their established, current market price.

(2) Is the mere *conditioning* of the sale of lettuce, which is sold at the maximum price established by the Price Administrator under the Emergency Price Control Act of 1942, upon the purchase in conjunction therewith

of celery, broccoli or honeydew melons, for which no maximum prices have been established, a criminal offense under the Act and the regulation of the Price Administrator prohibiting the evasion of established maximum prices by "tying-agreements", without defining such term, irrespective of whether the celery, broccoli or honeydew melons are sold at their established, current market price.

(3) Does the mere inclusion by the Price Administrator, in the evasion section of a maximum price regulation, of the words "tying-agreement", without defining those words, establish as a criminal act, the sale of lettuce, at its established maximum price, *in conjunction with* the sale of celery, broccoli or honeydew melons, for which no maximum prices have been fixed, when the celery, broccoli and honeydew melons are sold at their established, current market price, particularly where the buyer involved had regularly, and for many years, purchased celery, broccoli and honeydew melons as separate items on numerous occasions, both prior to and subsequent to the transactions complained of.

(4) Does the mere inclusion by the Price Administrator, in the evasion section of a maximum price regulation, of the words "tying-agreement, without defining those words, establish as a criminal act, the *conditioning* of the sale of lettuce, at its established maximum price, upon the purchase in conjunction therewith of celery, broccoli or honeydew melons, for which no maximum prices have been fixed, when the celery, broccoli, and honeydew melons are sold at their established, current market price, particularly where the buyer involved had regularly purchased celery, broccoli and honeydew melons as separate items on numerous occasions, both prior to and subsequent to the transaction complained of.

(5) Does the mere inclusion by the Price Administrator, in the evasion section of the maximum price regulation under consideration, of the words "tying-agreement", without defining those words, distinguish the instant case from the holding of this Court in *M. Kraus & Bros., Inc.* v. *United States*, ... U. S. ...., decided March 25, 1946.

Statute and Regulations Involved.

The information charged violations of Regulations of the Price Administrator under the Emergency Price Control Act of 1942 (Title 50, Section 901 *et seq.*, United States Code) and the rules, regulations and orders duly adopted and issued thereunder.

Section 902 (a) authorizes the Price Administrator to establish by regulation maximum prices for commodities in furtherance of the purposes of the Act. Section 902 (g) authorizes him to make regulations which he deems necessary to prevent the circumvention or evasion of established maximum prices.

Section 902 (h) provides that such powers shall not be exercised "to compel changes in the business practices, cost practices or methods, or means or aids to distribution, established in any industry, except to prevent circumvention or evasion of any regulation, order, price schedule, or requirement under this act."

Section 904 makes it unlawful for any person to sell or deliver any commodity in violation of any regulation or order of the price Administrator under Section 902.

Pursuant to this authority, the Price Administrator fixed prices for fresh fruit and vegetables (Maximum Price regulation No. 426) and promulgated a regulation in connection therewith (Sec. 11 of Art. 1 of Sec. 1439.3), as follows:

> "Evasion. The price limitations which are set forth in this regulation shall not be evaded, whether

by direct or indirect methods, in connection with any offer, solicitation, agreement, sale, delivery, purchase or receipt of or relating to fresh fruits or vegetables alone or in conjunction with any other commodity or by way of commission, service, transportation or any other charge or discount, premium or other privilege, or by tying agreement or other trade understanding or otherwise."

Statement.

Petitioner, George F. Fish, Inc., hereinafter referred to as the "corporation", is engaged in the fresh fruit and vegetable business in New York City as a commission merchant. It receives produce in carload lots from farmers and country shippers and and resells at wholesale to jobbers. The firm has been in business since 1883 (R. 113) with an unblemished record over that entire period (R. 182). Petitioner Simon was employed by the corporation as a salesman, and had been a salesman in the produce industry for over 40 years (R. 270).

The information herein (R. 2) contains three counts, each of them charging both petitioners with evading the provisions of Maximum Price Regulation 426, by requiring and compelling the purchase of a non-regulated commodity as the condition of the sale of a commodity regulated by M. P. R. 426.

At the conclusion of the trial, both petitioners were found guilty on all three counts (R. 157). The Court fined the corporate petitioner $1,500 on each count (R. 203). Petitioner Simon was sentenced to six months on each count, to run concurrently and sentence suspended (R. 199).

All three counts are in the same form. Each charges that petitioners, in connection with the sale of lettuce, the price of which was regulated by Maximum Price Regula-

tion 426, evaded the provisions of the regulation "by demanding, compelling and requiring" the purchase of another commodity (honeydew melons, broccoli and celery respectively) as a "condition of the sale * * * and as an integral part thereof, of the aforesaid lettuce".

It was conceded that in each case the lettuce was sold at the established ceiling price, and it was established by the undisputed testimony of an expert witness (R. 118-125), that in each case the secondary articles (none of which were regulated as to price) were sold at the established current market prices. It was also shown that the two purchasers involved dealt regularly in all three of the secondary commodities; that over a period of years, down to the very morning of the trial, they had been buying the secondary commodities alone as separate items (R. 27, 29, 174).

The Government's testimony as to compulsion was denied by Simon who testified clearly and unequivocally that there was no pressure on his part to induce the sale of the secondary commodities, that is, celery, melons and broccoli. He categorically denied compelling any customers to purchase any commodities they did not want at any time and supported the statement of Mr. Fish, the secretary and treasurer of the corporate petitioner, that such were the strict instructions of the firm (R. 94).

The testimony of the Government's witnesses was very meagre and indeed the District Judge characterized the case as "close" (R. 171). At the conclusion of the Government's case, at the end of the case and before sentence, the various motions of the petitioners to dismiss, for a directed verdict and in arrest of judgment, were denied (R. 86, 143, 176).

Specifications of Errors to Be Urged.

The Circuit Court of Appeals for the Second Circuit erred:

(1) In holding that verdicts ought not to have been directed by the trial court in favor of petitioners.

(2) In holding that the jury was justified in finding, beyond a reasonable doubt, that petitioners were guilty of the offenses alleged in the counts set forth in the information.

(3) In substantially holding that under the evidence, petitioners resorted to an illegal device to evade the maximum price ceilings upon fresh fruits and vegetables.

Reasons for Granting the Writ.

The recent decision of this Court in *M. Kraus & Bros. Inc.* v. *United States,* ..... U. S. ....., decided March 25, 1946, has left considerable doubt and uncertainty insofar as it effects regulations in other industries as to the scope and extent of its ruling. This is borne out by the doubt as to its meaning expressed by the United States Circuit Court of Appeals for the Second Circuit in its opinion written upon the rehearing in the instant case (R. 238, 239).

The evasion section of M.P.R. 426 (Sec. 11, of Article I of Sec. 1439.3) employs the exact language as that before this court in the *Kraus* case (Sec. 1429.5 of R.M.P.R. 269) except that in M.P.R. 426 the Administrator added the words "tying-agreement", to the list of methods which could not be employed for evasive purposes.

In all four opinions of this Court in the *Kraus* case, the terms "sale in conjunction", "combination sale", and "tying agreement" are used interchangeably. This Court held that the Administrator had the power to prohibit

sales of this character absolutely, that he did so specifically and in unmistakeable terms in certain regulations, e. g., in the case of meat and clothing.* Having done so in some instances and not in others, he must be presumed to have intended a different meaning where he used other language. It has now been established beyond cavil that a regulation which does not clearly and unambiguously set forth such a prohibition cannot be made the basis of a criminal prosecution.

In the meat and clothing regulations the Administrator left no doubt as to his meaning. In both of those regulations there is a prohibition against the sale of a regulated commodity "on condition that the purchaser is required to purchase some other commodity". As this Court said, the very definiteness with which tying agreements of all types were prohibited in regard to those commodities, and the absence of such express prohibition in other regulations might well lead a reasonable man to believe that tying agreements were permissible under certain circumstances, where such explicit language was not used. So, in the *Kraus* case this Court construed the applicable regulation as prohibiting only those tying agreements involving secondary products that are worthless or that are sold at artificial prices.

It is submitted that the same reasoning must apply in the instant case. Since the Court used the words "combination sales" and tying agreements" interchangeably, it cannot be argued that the mere inclusion of the words "tying agreement", without definition, in M.P.R. 426 adds anything to the language used in the poultry regulation. Surely the mere inclusion of those words does not satisfy the requirement of explicitness laid down by this Court in the *Kraus* case.

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*For meat regulation see Sec. 1464.406, R.M.P.R. 169 as amended Mar. 30, 1943, 8 Fed. Reg. 4099. Re clothing regulation see Sec. 15 R.M.P.R. 287 issued June 29, 1943, 8 Fed. Reg. 9126. See also Sec. 1389.555, M.P.R. 330, as amended August 7, 1943, 8 Fed. Reg. 11041.

The evasion section here in question lists *seventeen* separate methods by which evasion must not be accomplished, but it does not prohibit, absolutely, the use of any one of those methods. The section includes, among others: offer, solicitation, agreement, sale, delivery, purchase, tying agreement. Obviously, it cannot be contended seriously that all of those acts are prohibited *per se*. That would be tantamount to arguing that all offers to sell and all sales of fresh fruits and vegetables are prohibited. It would appear that these acts are prohibited only when employed as a method of evasion. If this is true of the others, it must also be true of tying agreements.

In the *Kraus* case, although the words tying agreement" were omitted from the regulation, nevertheless, this Court held that tying agreements were prohibited where the purchaser was required to buy a wholly worthless commodity or a second commodity at an excessive price as the condition of the sale of a regulated commodity. It is submitted that the mere inclusion of the words "tying agreement" does not change the plain meaning of the regulation.

It was established upon the trial herein by testimony of an official of the Office of Price Regulation (R. 81) that the term "tying agreement" has never been defined by the Price Administrator. Surely in the absence of such definition no more can be read into the section by inclusion of the term "tying agreement" than can be done in its omission. In neither case is there the definite and unmistakable prohibition contained in the clothing and meat regulations and in neither case is there the clear expression of the elements of evasive conduct required to bring the criminal penalties of the Emergency Price Control Act into operation.

A reading of the regulations in the clothing and meat industries, cited by this Court as instances in which the Price Administrator specifically prohibited tying agree-

ments *per se*, will show beyond doubt that even the Price Administrator, himself, did not intend, by the inclusion of the term "tying agreement" in an evasion section, to establish an absolute prohibition against the use of combinaiton or tie-in sales under all circumstances. In both of those regulations, under the heading "prohibitions" he set forth the injunction against conditioning the sale of one commodity upon the purchase of another. But each of those regulations also contains an evasion section which sets forth, verbatim, the exact language of that now before this Court, including the words "tying agreement". Obviously there would have been no reason or necessity for this specific prohibition if the evasion section alone had been intended as a ban on such sales *per se*. It is submitted there is no magic connotation to the words "tying agreement". Standing by themselves, in an evasion section, they do not, *ipso facto*, satisfy the requirements laid down by this Court for the definition of criminal conduct. As Mr. Justice Murphy held in the *Kraus* case:

> "the elements of evasive conduct should be so clearly expressed by the Administrator, that the ordinary person can know in advance, how to avoid an unlawful course of action."

The prevailing opinion in the *Kraus* case made it clear that it was in the mind of the Administrator to prohibit only those tying agreements involving secondary commodities that were worthless or sold at artificial prices.

Mr. Justice Black in his opinion in the now famous case of *Williams et al* v. *North Carolina*, 325 U. S. 266, said:

> "A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess at its meaning, and differ as to its application, violates the first essentials of due process of law."

The uncertainty of the language used in the regulation under question made every reputable merchant a potential criminal. Unfortunately, the decision in the *Kraus* case has not clarified the situation sufficiently and it is still, as the Circuit Court of Appeals held on the application for rehearing, doubtful whether the mere inclusion of the words "tying agreement" differentiates those regulations containing that term from the regulation before the Court in the *Kraus* case.

With the continuing scarcity of foods and other commodities, the exact meaning of these regulations becomes a matter of great public importance. Many reputable business men are subject to prosecution for acts which they sincerely believe to be legal and proper. A large number of informations and indictments are pending throughout the country which turn upon the very question now raised and it is hoped that this Court may see fit to clarify the existing uncertainty.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 20, 1946.